IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.916 OF 2006 IN SUIT NO.4913 OF 2000

Majid Ahmed Oomerbhoy. ...Plaintiff.
Vs.
Rashid Sattar Oomerbhoy and ors. ...Defendants.

Mr. Zubin Jariwalla i/by Thakore Jariwalla and Associates for the plaintiff.

Mr.Shailesh Shah with Mr. Sanjay Jain with Ms.T.Saria i/by S.K. Srivastav & Co. for the defendant No.1.

Mr.R.S.Jaisinghani i/by Munir Purchant for the Defendant No.2.

Mr.Shadab Perzade for the Respondent No.4.

Mr.Rane, Representative of Court Receiver present.

CORAM : R.S. MOHITE, J.
DATED : 15/11/2006.

P.C.

1. This is a chamber summons taken out by the original defendant No.1 in the main suit for a direction to the Court Receiver to take forcible possession of the premises viz. shop cum godown situated at 164/106, Bapty Road, Mumbai-400 004 by breaking open the lock, if required and by removing all persons therein with the help of police, if required. This relief is sought by prayer clause (a) and by prayer clause (b) the defendant seeks further direction to the Court Receiver to appoint an Advocate practising in Small Causes Court at Mumbai to take appropriate steps to set aside the exparte

decree dated 29.1.2005 passed by the Small Causes Court at Mumbai in R.A.E. Suit No.640/829 of 2002 filed by the second respondent Mr. Abdul Gafoor Shaikh against the heirs and representatives of Ahmed Oomerbhoy in respect of the same premises.

2. It is admitted position that the Court Receiver was appointed on 6.12.2000 and the Court Receiver took the possession of the aforesaid premises on 13.9.2000 and on the said date he put his lock and seal on the suit premises.

3. It appears that on the date when the Court Receiver took the possession, the respondent No.2 who is landlord of the premises had filed suit No.829 of 2000 for recovery of possession and arrears of rent and the said suit was pending. From the plaint, it appears that the said suit was filed against the heirs of the deceased Ahmed Oomerbhoy who according to the landlord was their tenant. It appears that since no person was named as heir in the said suit filed in the Small Causes Court, the summons was served by publication in the newspaper and ultimately on 29.1.2005 exparte decree came to be passed. In pursuance of the exparte decree, the present respondent No.2 who was plaintiff in the Small Causes suit proceeded to take possession on 5.12.2005. The bailiff’s report indicates that when he went to the

premises, premises were open. It is not known as to who had removed the seal and board of the Court Receiver. The record also indicates that during the pendency of the execution proceeding on 30.3.2005, the Court Receiver's representative remained present in the Small Causes Court and this fact was noted in the roznama. On 25.4.2005, one Advocate Mr. Borkar filed an application in the execution proceeding seeking adjournment and in this application, he brought to the notice of the court that the Court Receiver is in possession of the suit premises.

4. In my view, since the Court Receiver was appointed by order of this court dated 6.12.2000 the property in question is in possession of the Court Receiver and therefore, no decree could have been executed without making the Court Receiver as party to the proceeding. It is now the stand of the respondent No.2 that after taking possession he gave tenancy to his son who in turn has given the possession to respondent No.4 on leave and licence basis. In my view, once taking of possession is improper, the creation of further rights in the property are illegal and bad in law. No party in respect of whom illegal rights have been created can be permitted to claim any right in equity or law. The possession of the property must be taken back by the Court Receiver appointed by this court. The Advocate for the defendant

states that he has taken possession as a licensee without the knowledge of the claims thereof. He seeks 90 days time to make the alternative arrangement. In the circumstances, chamber summons is made absolute in terms of prayer clause (a) as the Advocate for the defendant No.4 has filed undertaking dated 15.11.2006 in this court to the effect that he will handover the vacant and peaceful possession of the property in question after 90 days from today. Undertaking is accepted. The Court Receiver will not execute this order for a period of 90 days only. It will be open for the Court Receiver to move the Small Causes Court for setting aside the exparte decree and he will be entitled to engage an advocate. Chamber summons stands disposed off.

5. The Advocate for the respondent No.4 states that he is paying Rs.9500/- as licensee fee to the son of the respondent No.2 and he undertakes that he will pay Rs.9500/-p.m. as royalty regularly to the Court Receiver. In the event of default in payment of royalty and after 90 days the Court Receiver is entitled to remove him from the suit premises with police aid if necessary. The respondent No.4 to pay the royalty on or before 10th day of each month.

(R. S. MOHITE, J.)